

ORIGINAL

**USWEST**

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EX PARTE OR LATE FILED

**Melissa Newman**  
Vice President - Federal Regulatory

October 13, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

EX PARTE

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 - 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, DC 20554

RE: CC Docket No. 99-117: FOIA Request Control No. 99-163

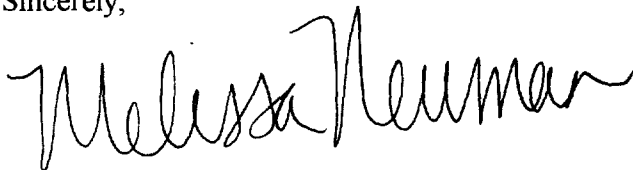
Dear Ms. Salas:

On Tuesday, October 12, 1999, Jim Hannon, Bill Johnston and the undersigned, representing U S WEST, met with Linda Kinney, Legal Advisor to Commissioner Ness to discuss the above-referenced proceeding. The attached material was distributed at the meeting and served as the basis of the discussion.

In accordance with Section 1.1206(b)(2) of the Commission's rules, an original and one copy of this letter and attachment are being filed with your office for inclusion in the public record of this proceeding.

Acknowledgment and date of receipt of this submission are requested. A duplicate of this letter is attached for this purpose.

Sincerely,



Attachments

cc: Linda Kinney

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## MCI's Freedom of Information Act Request

**The Bureau's decision to grant MCI's FOIA request is bad law, bad policy, and bad precedent and should be reversed.**

- Neither Section 220(f) nor 154(j) provides the Bureau with an independent basis for releasing confidential audit information. The Bureau cannot legally release such information until it has complied with the FOIA's requirements as reflected in Section 0.457 of the Commission's Rules.
- If the Bureau's decision is not reversed, it will impair the Commission's ability to obtain sensitive audit information in the future.
  - Audit efficiency could be reduced as LECs establish limits on access to information (e.g., time and place restrictions).
  - LECs and auditors, alike, could waste valuable time and resources in identifying and protecting confidential audit information (e.g., state audit experience).
  - Once the confidentiality of the audit process has been breached, it could have a chilling effect on both the Commission's own "deliberative processes" and LECs' ability to provide information requested during the course of audits.
- MCI does not need the U S WEST information covered by its FOIA request.
  - The requested information is not needed to respond to NOI Issue No. 2 (i.e., the reasonableness of the auditors' rescoring methodology).
  - MCI has already viewed Bell Atlantic's audit workpapers and filed comments on the NOI on September 23, 1999.
- Failure to reverse the Bureau's decision will burden the Commission's administrative processes by inviting more, even less meritorious, requests for confidential audit information.

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James T. Hannon  
Senior Attorney

**USWEST**

September 16, 1999

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Room TW-A325  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Ex Parte

RE: FOIA Request Control No. 99-163; CC Docket No. 99-117

Dear Ms. Salas:

On September 15, 1999, Melissa Newman, Bill Johnston, Pat Carome and the undersigned, representing U S WEST, met with Susan Steiman of the Office of General Counsel ("OGC") to discuss U S WEST's Application for Review in the above-captioned proceeding concerning MCI's Freedom of Information Act ("FOIA") request for confidential U S WEST data submitted in the Continuing Property Records audit.

U S WEST's purpose in meeting with Ms. Steiman of the OGC was to discuss the legal implications of disclosing confidential audit information and the procedures to be complied with if such information were to be disclosed. First and foremost, it is U S WEST's position that the Trade Secrets Act requires that commercial information, such as that provided by U S WEST during the CPR audit, not be disclosed unless it is "authorized by law."<sup>1</sup> Under controlling Supreme Court authority,<sup>2</sup> neither Section 220(f) nor Section 154(j) of the Communications Act is the type of statute that provides the Commission with the requisite legal authority to disclose information subject to the Trade Secrets Act. As such, the Bureau's reliance on these sections of the Act as a basis for granting MCI's FOIA request is misplaced. Far from authorizing disclosure, Section 220(f) forbids releasing information collected during an audit unless directed by the Commission or a court.

Rather than authorizing disclosure, U S WEST submits that the plain language of Section 220(f) does nothing more than acknowledge that disclosure may be permissible under some limited circumstances where some other legal authority provides a basis for disclosure. While U S WEST acknowledges that the Commission has previously stated that Section 220(f) may grant it authority to disclose material protected by the Trade Secrets Act, we do not believe that such an interpretation can be reconciled with the plain language of Section 220(f). Similarly, Section 154(j) cannot be read to authorize release of documents protected by the Trade Secrets

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<sup>1</sup> 18 U.S.C. § 1905.

<sup>2</sup> See, Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979).

Ms. Magalie Roman Salas  
Secretary  
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Act. This Section is nothing more than a procedural housekeeping statute and provides no authority to disclose protected trade secrets.<sup>3</sup>

The only authority to release U S WEST's confidential audit information is found in the FOIA and Section 0.457 of the Commission's rules. Section 0.457 requires that the Bureau "weigh the policy considerations favoring non-disclosure against the reasons cited [in the FOIA request] for permitting inspection in light of the facts of the particular case."<sup>4</sup> The Bureau did no such weighing and mistakenly concluded that it need not reach the merits of U S WEST's Exemption 4 arguments on the grounds that Section 220(f) and 154(j) permit discretionary disclosure. As noted above, these statutes do not authorize the Bureau to disclose confidential audit information and, even if they did, they still would not allow the Bureau to circumvent the requirements of Section 0.457 of the Commission's rules.

If the Bureau had conducted the analysis required by Section 0.457, the Bureau would have found that there is no compelling reason to permit MCI and others to gain access to U S WEST's confidential information. On the contrary, release of confidential audit information would cause competitive harm to U S WEST and impair the Commission's ability to obtain necessary information in the future.<sup>5</sup> In order to protect U S WEST confidential information and preserve the integrity and efficiency of the audit process, the Commission should reverse the Bureau's decision granting MCI's FOIA request.

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically for inclusion in the record of this proceeding.

Respectfully,

James T. Hannon

cc: Susan Steiman  
Andy Mulitz

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<sup>3</sup> Id.

<sup>4</sup> 47 C.F.R. § 0.457.

<sup>5</sup> National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).